Supreme Court of the United States

October Term, 1967.

No. 71

JAMES P. CARAFAS, PETITIONER,

vs.

J. EVIN LaVALLEE, WARDEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Statement of Jurisdiction.

This is an appeal from the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 21, 1967, affirming the order of the United States District Court for the Northern District of New York, which did not sustain the Writ of Habeas Corpus. The Judgment of the trial court convicting the appellant and his wife of Burglary in the Third Degree and Grand Larceny in the Second Degree was affirmed in the Appellate Division for the Second Department in the State of New York, with no opinion, 14 A. D. 2d 886. The Court of Appeals of the State of New York thereafter affirmed the findings of the lower court with no opinion, 11 N. Y. 2d 891. Remitter of that was amended to show the unreasonable search and seizure question was presented and passed upon, 13 N. Y. 2d 600.' Certiorari was denied the appellant in 372 U. S. 948. Subsequently, the

Federal Procedure of Habeas Corpus was invoked, and the matter came before the United States District Court for the Northern District of New York.

On May 6, 1966, the said District Court denied the said application. Thereafter, the appellant filed his notice of appeal to the Court of Appeals for the Second Circuit, and requested appeal *in forma pauperis;* this was denied with no opinion. The appellant, thereupon, moved for re-argument and the same was denied with no opinion. The appellant applied for a Writ of Certiorari and the same was granted on October 16, 1967. ..... S. Ct. ..... (not yet reported).

Opinion Below.

The opinion of the United States District Court for the Northern District of New York is set forth in the Appendix pages A49-A56 and was written by the District Judge James T. Foley denying the application for the Writ of Habeas Corpus.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. #1257 (3).

Constitutional Provisions and Statutes Involved.

The pertinent portions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Statutes are involved (Appendix A, *infra*, pp. 23 *et seq.*).

Statement of the Case.

The Nassau County Police of the State of New York received a theft complaint of furniture from a real

estate developer. The complaint was made on the 3rd day of June, 1959.

Two detectives, Grim and Kapler, were assigned to investigate. During the course of their investigation, they ascertained that a Cadillac automobile, with a trailer, had been seen near the burglarized premises in the early morning of the aforesaid day. They uncovered the owner of the said automobile, and this led them to the home of the appellant and his wife in Astoria, Queens, City and State of New York.

The premises of the appellant consisted of a two-story building. The ground floor was rented to a physician for medical offices. The entrance to the building was through a front door. This door opened into a vestibule, which led to the doctor's office and to the right it led on to the upstairs apartment, the appellant's premises.

Alongside the street entrance door, push bells, clearly labeled as to the occupants, were affixed. These bells were in operating order. Inside the vestibule, two additional bells were placed for each occupant, together with mailboxes for each unit.

Of course, each unit was separate and apart from the other, save for a common vestibule or hallway, which led to the separate unit.

The detectives mounted the stairway of the appellant, without permission or consent of the owner. While trespassing, they testified that they noticed the missing furniture that they were looking for.

Questions Presented.

1. Whether the arrest of the appellant without a warrant or probable cause was a charade for the unlawful search and seizure that preceded and followed the arrest?

2. Whether reasonable grounds existed for the exclusion of photographic evidence allowed in the record over appellant's objections, thereby denying due process under the Fifth Amendment, and whether the appellant received a fair and impartial trial?

3. Whether the United States Court of Appeals erred in affirming the lower court's ruling depriving the appellant of his constitutional rights under the Fourth and Fourteenth Amendments, concerning the habeas corpus proceedings?

4. Whether the Appellate Courts of the State of New York erred in not applying the principle enunciated in *Mapp v. Ohio,* 367 U. S. 643, as they were mandated to do?

5. Whether the appellant was entitled to appeal the lower court's decision, although the United States Court of Appeals had denied him the right to entertain such appeal *forma pauperis*?

Summary of Argument.

The constitutional rights of the appellant against unlawful searches and seizure were committed in derrogation and violation of the Fourth Amendment of the Constitution. The detectives gained access to the stairway leading to the appellant's apartment without consent or permission, after observing (Appendix, pp. A150-A154), the detectives contended they had a right to be there. It is urged that they did not have that right (*Gatlin v. U. S.*, C. A. D. C., 1963, 326 F. 2d 666; *Staples v. U. S.*, C. A. Fla., 1963, 200 F. 2d 817; *Mallory v. U. S.*, App. D. C., 1957, 77 S. Ct. 1356, 354 U. S. 449; *Mapp v. Ohio,* 367 U. S. 643).

Moreover, the detectives on entrance to the appellant's stairway became trespassers, since no legal justification

existed for their presence on the said stairs (see: *McDonald v. United States,* 335 U. S. 451; *People v. Barton,* 18 A. D. 2d 612 [New York Reports]; Former New York Penal Code, Section 2036 and Section 140.05 under the Revised Penal Law, effective September 1st, 1967). Therefore, the fruits of the detectives' search, by reason of the illegal invasion of the private property, became inadmissible in a court of law (see: *Silverthorne v. U. S.,* 251 U. S. 385; *Johnson v. U. S.,* 228 U. S. 457).

It is further contended that the Courts of New York State were mandated to follow the principles set forth in the Constitution and by the United States Supreme Court. It is suggested that they did not do so. Inadmissible evidence garnered by the detectives was permitted to enter the record and moreover compounded the error by allowing into evidence photographs taken of allegedly missing furniture. The Fourth and the Fourteenth Amendments were certainly transgressed.

The dictates of the Fifth Amendment were violated in that they interrogated the appellant without advising him of his legal rights thereunder (see: *Miranda v. State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602).

It is to be noted that the detectives have varying testimony of the occurrence, at the trial court they testified in one manner (Appendix, pp. A150-A154); in the hearing to dismiss two other pending matters they asserted something different (Appendix, pp. A239-A240); and ultimately some six years later, before District Judge James T. Foley, again, the version of happening is different (Appendix, pp. A112-A115). The divergence of testimony of the detectives lends itself to questionable creditability.

POINT I.

The alleged arrest of the defendant was a subterfuge for an unlawful search and seizure of his premises in violation of the Constitutional Amendments.

Two detectives, acting on a complaint of furniture theft in a development area, ascertained that a Cadillac car had, on June 3rd, 1959, been on the said premises. This scant information led the Detectives to a two-story building denoted as 35-33 30th Street, Borough and County of Queens, City and State of New York.

The ground floor contained offices for a medical doctor, and the upper floor was occupied by petitioner. Just outside the street entrance door is a small vestibule, leading to a hallway. The doctor's waiting room entrance is to the left of the vestibule and to the right is a doorway, just beyond is the stairway leading to the second floor, the premises occupied by petitioner and his wife.

The sash on the street entrance door contained two bells, with nameplates, which showed clearly the occupants of the building.

The testimony of the detectives is that they walked up the stairs, without announcing themselves, and, about halfway up the stairs, Grim noticed furniture previously described to him (A149-A155). Whereupon, he testified that he placed the petitioner under arrest at the top of the stairs. The petitioner's version is contradictory. He states he was napping on the divan and the detectives awakened him. They inquired if he was the owner of the furniture and placed him under arrest.

Irrespective of the factual circumstances, the one factor stands out clearly, that at the time they were at the petitioner's premises, they had a suspicion, but no warrant of

arrest. Neither did they have a search warrant. The detectives entered the private dwelling of the petitioner, without any permission. The moment they walked up the stairway, they were trespassing on private property.

It is conceded that an arrest without a warrant may be made under certain circumstances. See: *United States v. DiRe,* 332 U. S. 581. Notwithstanding, the Court, in *Mapp v. Ohio,* 367 U. S. 643, while admitting that the rule in the *DiRe* case still prevails, nonetheless, qualified the arrest without a warrant. It said, "Arrests on mere suspicion collides violently with the basic human right of liberty" (see: Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rational and Rescue, 47 Geo. L. Journal 1, 22).

It is axiomatic that no police officer may gain admittance to a private dwelling without permission, unless probable cause exists. This is inclusive of apartment hallways, yard, various enclosures of the private premises, as well as, the curtilage of such property. If entry is made to any of the aforementioned to merely observe and obtain probable cause, the entry, arrest and incidental search are unlawful.

McDonald v. United States, 335 U. S. 451;
Burks v. Com of Kentucky, 247 S. W. 938;
People v. Woodward, 183 N. W. 901.

In the case at bar, Detective Grim admitted that he was at least halfway up the stairs before he saw what he claimed to be able to have "recognized" as a chest of drawers alleged to be missing from the model home in the development. Thereafter, he said he saw the petitioner, at the head of the stairs, identified himself and his purpose for his presence.

Holding strongly to the constitutional right of privacy, Mr. Justice Jackson, in a concurring opinion in *McDonald v. United States,* 335 U. S. 451 at page 459, stated:

> "Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality."

Citing: *Weeks v. United States,* 232 U. S. 383; *Taylor v. United States,* 286 U. S. 1; *Johnson v. United States,* 333 U. S. 10; and continuing, stated:

> "It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it * * *"

In the instant matter, all the detectives had was a clue that the owner of the gray Cadillac may have been involved in the missing furniture. This does not justify the alleged trespass, without a warrant. See: *Agnello v. United States,* 269 U. S. 20 at page 33, the Court held:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnished no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding, facts unquestionable showing probable cause."

The trial record is barren of any consent. On the contrary, it smacks of a violent struggle to deter such search.

Ergo, the unlawful entry of the detectives negated any justification of arrest. As a matter of fact, the arrest was made to justify the unauthorized search. The evidence should have been suppressed.

POINT II.

Evidence adduced at the trial should have been excluded under the Fourth Amendment of the Constitution.

The photographs of the alleged seized furniture were introduced into evidence over the objections of defense counsel. The "fruits of the poisonous tree" continued to abase the petitioner. They should not have been received in evidence. Moreover, the testimony of the detectives as to their observations in the home should have been suppressed. Certainly, oral admissions by the petitioner should have been obviated.

See:

Nardone v. United States, 308 U. S. 338;
Silverthrone Ltd. Co. v. United States, 251 U. S. 385;
McGinnis v. United States, 227 F. 2d 603;
Williams v. United States, 105 U. S. App. D. C. 41, 263 F. 2d 487.

Under the rule of *Mapp v. Ohio, supra,* each of these matters should have been excluded, as all "are affected by the vice of primary illegality," as it was held in *Takahashi v. United States,* 143 F. 2d 118.

The Court in *Brock v. United States,* 223 F. 2d 681, 5th Cir., held that when the unauthorized search is accomplished by a trespass, such search is a violation of the constitutional safeguard of a man's right of privacy. In the instant matter, Detectives Grim and Kapler sought with their eyes, and ascertained what they sought upon the invasion of appellant's home. Again, in *Brock v. United States, supra,* at page 685, the Court states:

> "To begin with, the agents, when they appeared outside Brock's bedroom window, were in violation

> of his rights under the Fourth Amendment. Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment."

In the case of *Silverman v. United States,* 365 U. S. 505, wherein the officers testified to hearing incriminating information by means of a "spike mike," that is, an electronic device which had been inserted through the wall adjoining Silverman's home, the Supreme Court reversed on grounds that trespass occurred. The instrument used had penetrated one-quarter inch into Silverman's heating duct, thereby converting his heating system into a conductor of sound. In reversing the Court evolved the same rule as in the *Mapp v. Ohio, supra,* enforcing the Fourth Amendment and the Fourteenth Amendment.

In the case at bar, the officer testified as to what he saw that led him to arrest the appellant. In *Silverman v. United States, supra,* the officers heard the incriminating evidence that subsequently followed the arrest of Silverman. In each instance, the arrest followed the search. The search being itself illegal cannot justify the arrest.

See:

Byars v. United States, 273 U. S. 28;
Henry v. United States, 361 U. S. 98;
Accarino v. United States, 179 F. 2d 456;
United States v. Dire, 332 U. S. 581.

No special or exceptional circumstances prevailed to allow the intrusion upon the right of privacy. The search by observation and arrest followed after a general search and seizure, all seemingly in violation of the Fourth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.

See:

Johnson v. United States, 333 U. S. 10;
Giordenello v. United States, 357 U. S. 480;
Wolf v. Colorado, 338 U. S. 25.

A review of the facts pitted against the authorities should result in the exclusion of the evidence and a suppression thereof, when tested in the crucible of legal dissection.

POINT III.

The Courts of the State of New York were mandated to adhere to the principles enunciated in *Mapp v. Ohio, supra.*

The instant case was tried in the fall of 1960, the parties found guilty, and an appeal ensued to the intermediate Appellate Court. While this appeal was pending in the said Appellate Court, the Supreme Court of the United States, on or about June 19, 1961, had decided the case of *Mapp v. Ohio, supra,* which excluded evidence which was obtained as a consequence of an illegal search.

The record is abundantly clear from trial record that objections were made as to the introduction of photographs. Timely objections were taken at the trial by defense counsel as to all other illegal evidence adduced.

The New York Court of Appeals had raised the issue in order for an appellant to benefit by the change of law, it would have been necessary to raise the matters by objection in the trial court. The said Court enunciated that principle in *People v. Coffey,* 11 N. Y. 2d 148, and *People v. Friola,* 11 N. Y. 2d 157; *People v. O'Neill,* 11 N. Y. 2d 148.

In the case of *People v. Coffey, supra,* the case was remitted to trial court solely for the purpose of the determining the issue whether search and seizure had been incident to lawful arrest. In *People v. O'Neill, supra,* the Court said that even if the constitutional issue wasn't raised, a general objection would be sufficient to preserve the issue of illegal search and seizure for review. Thereafter, the Court in *People v. Friola, supra,* said that they wouldn't consider the issue because it wasn't raised at the trial. Chief Judge Desmond, in his dissent in the latter case, stated:

> "We are now saying that we will not apply the new law in a pre-*Mapp* case unless on the trial the defendant's counsel did what was then futile, unreasonable and contrary to the then law, * * *."

Except for the offense and evidence in the *People v. O'Neill, supra,* the present case parallels it. The accused in both were manhandled by the eager detectives. They demanded a search warrant. The illegal search took place prior to the arrest. The accused were under suspicion. The detectives were acting on complaints. None of the detectives had any warrants. Objections were taken by defense counsel in both matters. However, the *O'Neill* appeal was allowed, but refused in the case at bar.

Apparently, groundless objections by defense counsel in the aforestated three cases gave the defendants an opportunity. But, oddly, and inconsistent with the ruling, the New York Court of Appeals affirmed the lower court without opinion in this case.

Chief Justice Marshall in *United States v. Schooner Peggy,* 1 Cranch 103, stated:

> "It is, in general, true that the province of an Appellate Court is only to inquire whether a judgment when rendered was erroneous or not. But, if subsequent to the judgment and before the decision

> of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. If the law be constitutional and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation."

To the same effect, see the following authorities, wherein a decision must be rendered pursuant to the prevailing law at the time the Court will have decided the appeal.

People v. Kenono, 9 N. Y. 2d 924, 217 N. Y. S. 2d 92;
People v. Oliver, 1 N. Y. 2d 152, 151 N. Y. S. 2d 367;
People v. Loria, 10 N. Y. 2d 368, 223 N. Y. S. 2d 462;
United States v. Massey, 291 U. S. 608.

It would then appear that the Appellate Division for the Second Department in the State of New York and the Court of Appeals should have applied the case of *Mapp v. Ohio, supra,* ruling. Moreover, under the New York Code of Criminal Procedure, Section 527, the Court has the power to set aside a trial in the interest of justice. The said section is as follows:

> "However, an intermediate Appellate Court may, regardless of objections and exceptions, reverse in the interests of justice or because the trial court judgment was against the weight of the evidence."

The State Courts were bound by the prevailing law, and should have suppressed the evidence illegally obtained.

POINT IV.

The appellant's constitutional rights against self-incrimination were violated.

The detectives entered the subject premises, after an unlawful search, and announced that the defendant was under arrest, began to interrogate the appellant. All this without advising the appellant as to his constitutional rights to remain mute if he so desired.

In the case of *Miranda v. State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602, the Court said the following:

> "* * * the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * *
>
> * * *
>
> "The constitutional issues we decide in each of these cases is the admissibility statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. * * *. In all the cases, the questioning elicited oral admissions, * * * which were admitted at the trial. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incrimination statements without full warnings of constitutional rights."

Detective Grim interrogated appellant without affording him any warning of his right to remain silent and then testified to appellant's admission that he was the owner of the missing furniture.

The Court further said in *Miranda, supra:*

> "The Court practice of incommunicado interrogation is at odds with one of our nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."
>
> * * *
>
> "Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They know that 'illigitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States,* 116 U. S. 616, * * *. The privilege was elevated to constitutional states and has always been 'as broad as the mischief against which it seeks to guard.' *Counselman v. Hitchcock,* 142 U. S. 547, 12 S. Ct. 195. We cannot depart from this noble heritage."
>
> * * *
>
> "In sum the privilege is fulfilled only when the person is guaranteed the rights 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' *Malloy v. Hogan,* 378 U. S. 1, 8, 84 S. Ct. 1489. The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this court the privilege has consistently been accorded a liberal construction. *Albertson v. Subversive Activities Control Board,* 392 U. S. 70, 86 S. Ct. 194; *Hoffman v. United States,* 341 U. S. 479, * * *. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subject to the techniques

of persuasion described above cannot be otherwise than under-compulsion to speak."

* * *

"The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."

In the *Miranda* case *(supra)* the Court said:

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of his privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding that intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary-system—that he is not in the presence of persons acting solely in his interest.

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

* * *

"*Escobedo v. State of Illinois,* 378 U. S. 478, 84 S. Ct. 1758. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with consent prior to questioning, but also to have counsel present during any questioning in the defendant so desires."

It is submitted that an individual need not ask or require a lawyer to be present at any interrogation. However, a request of that nature affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver.

Accordingly it is contended that if an individual is to be held for interrogation he must clearly be informed that he has a right to consult with a lawyer and if he desires to have a lawyer at the interrogation he can do so, as this will insure him of his rights under the law.

> "The requirements of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."
>
> * * * *
>
> "Where rights secured by the Constitution are involved there can be no rule making or legislation which would abrogate them."

In the *Gault* case, 387 U. S. 1, 87 S. Ct. 1428, Judge Fortas, speaking for the majority opinion, said:

> "Failure to observe the fundamental requirements of due process has resulted in instances which might have been avoided of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure.' But, in addition, the procedural rules which have been fashioned from the generality of due process our best instrument for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of

> due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what scientific method is to science.'"

Mr. Justice Fortas, continuing in the *Gault* case, stated:

> "The language of the Fifth Amendment, applicable to the states by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As Mr. Justice White, concurring, stated in *Murphy v. Waterfront Commission,* 378 U. S. 52, 84 S. Ct. 1594."

The principle of *Miranda, Gault, Escobedo* and the protection of the Fifth, Sixth and Fourteenth Amendments can be invoked in any proceeding including the case at bar.

Mr. Justice Fortas continued in *Gault:*

> "Appellants are entitled to these rights not because 'fairness, impartiality and orderliness—in short, the essentials of due process require them and not because they are 'the procedural rules which have been fashioned from the generality of due process,' but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth makes applicable to the states."

In the case at bar the appellant was not given any opportunity at all. He was subjected to arrest at the head of the stairway, if we are to believe the detectives. Henceforth, all his constitutional rights were violated. No warning of such rights were given to him. On the contrary, he was brutally battered in his sanctuary. His castle was trampled and devastated by the detectives.

The fortress of the law can only be bolstered to its fullest, if we obey it. Disobedience of that law can only lead to tyranny. Civilians and police officers alike must adhere to its dictates. Failing, in anywise, to maintain

its austerity and directives will bring on chaotic conditions. A review of the record will undoubtedly reveal nonconformance of the law by the detectives. Justice can then prevail if the injudicious conduct of the detectives can be exposed.

POINT V.

The Court of Appeals for the second Circuit should have allowed appeal in *forma pauperis*, or, alternatively, should have allowed appeal upon compliance with rules.

The Learned District Judge James F. Foley stated in his decision as follows (Appendix, p. A56):

> "A notice of appeal, if forwarded to the Clerk of this court, Federal Building, Utica, New York, shall be filed by the Clerk, without payment of prescribed fee. Application for leave to appeal generally *in forma pauperis* should be directed to the Court of Appeals, Second Circuit."

It is respectfully submitted that the appellant did exactly as he was directed. He filed a timely appeal. He made a motion to file *forma pauperis*. The Court of Appeals, Second Circuit, denied the motion and dismissed the appeal. Again, he filed a motion for re-argument and requested that he be given the right to appeal; this was likewise denied. It will be noted that the appeal was taken within the prescribed time. See Rule 37 of the F.R.C.P.

It is apparent from the denial that the Court of Appeals believes the matter to be frivolous. If the reverse were true, then the appellant should have been allowed to appeal *in forma pauperis*.

See:

Coppedge v. United States, 369 U. S. 438, 82 S. Ct. 917;
Ellis v. United States, 356 U. S. 674, 78 S. Ct. 974;
Jones v. United States, 266 F. 2d 924.

But, it is difficult to understand how you can arrive at a different conclusion, since the District Court imputed probable cause. Certainly then, the appeal is not frivolous. The Supreme Court has said that "the good faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit," therefore, the application must be granted.

See:

Johnson v. United States, 352 U. S. 565, 77 S. Ct. 559.

It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard as is any appellant in a criminal case, if he makes a rational argument on the law or facts.

See:

Coppedge v. United States, supra.

It is submitted that, under the circumstances, the Court of Appeals should have allowed the appeal *forma pauperis.* A fortiori it should have allowed the appeal on the reargument, but, contrary, it denied the appellant's request. This was tantamount to the deprivation of the appellant's rights and privileges, both under the Federal Rules of Criminal Procedure and the Fourteenth Amendment.

CONCLUSION.

The order of the District Court should be reversed, the writ of habeas corpus should be sustained, reversing the conviction of the Nassau County Court; or, in the alternative, the matter remanded to the State Court for further proceedings, if any.

Respectfully submitted,

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Attorney for Petitioner.